IN THE

Supreme Court of the United States

October Term, 1942.

No. 452.

CORN EXCHANGE NATIONAL BANK AND TRUST COMPANY, PHILADELPHIA, and EDWARD C. DEARDEN, SR.,

Petitioners,

v.

NORMAN KLAUDER, Trustee of the Estate of QUAKER CITY SHEET METAL CO., Bankrupt,

Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF FOR PETITIONERS.

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v.

NORMAN KLAUDER, TRUSTEE OF THE ESTATE OF QUAKER CITY SHEET METAL CO., BANKRUPT,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR PETITIONERS.

This case comes before the Court on Writ of Certiorari issued to review a decree of the United States Circuit Court of Appeals for the Third Circuit.

OPINIONS BELOW.

The opinions and orders of the Referee, Henry W. Braude, Esq., filed on April 21, 1941, appear in the Record at pages 14 and 32. The opinions and order of the United States District Court for the Eastern District of Pennsylvania by District Judge Kirkpatrick, filed September 17, and November 10, 1941, appear in the Record at pages 38 and 39.

The opinion of the United States Court of Appeals for the Third Circuit, written by Circuit Judge Maris, and concurred in by Circuit Judge Goodrich (R. 41), with a dissent written by Circuit Judge Jones (R. 46) was filed on August 12, 1942, and is reported in 129 Fed. (2d) 894.

JURISDICTION.

The jurisdiction of this Court to review the judgment of the Circuit Court of Appeals for the Third Circuit on a Writ of Certiorari is provided by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938, 28 U. S. C. A. Sec. 347) and Section 24 (c) of the Bankruptcy Act of June 22, 1938 (52 Stat. 854, 11 U. S. C. A. Sec. 47).

The judgment of the United States Circuit Court of Appeals for the Third Circuit was entered August 12, 1942 (R. 50). Petition for Writ of Certiorari was granted by this Court on November 9, 1942 (R. 55).

STATEMENT OF THE CASE.

This case involves the proper interpretation of the new provisions added by the Chandler Act of 1938 to the preference section (Section 60 (a))[1] of the Bankruptcy Act.

The facts are not in dispute (R. 13, 24). Quaker City Sheet Metal Company (hereinafter called the "Bankrupt"), acting under the supervision of a Creditors' Committee (R. 6, 26, 33) made an arrangement with Corn Exchange National Bank and Trust Company, Philadelphia, one of the Petitioners, Appellants herein, (hereinafter called the "Bank"), whereby the Bank loaned money to

[1] Act of June 22, 1938, c. 575, Sec. 1, 52 Stat. 869, 11 U. S. C. A. Sec. 96.

Bankrupt from time to time upon the security of contemporaneous assignments of accounts receivable (R. 18, 32, 34). This arrangement was carried out from May 1938 until the date of bankruptcy on April 15, 1940. In addition, certain new contracts were negotiated by the Bankrupt (R. 29, 30). The Bank advanced money to meet payrolls under an agreement giving the Bank an assignment of moneys due and to become due under the contracts. (R. 30.) The assignments were noted upon the books of the bankrupt and were stamped upon its ledgers (R. 28). As the moneys became due they were again assigned to the Bank and the assignment was noted on the copies of the invoices retained by the Bankrupt (R. 28, 30). All of the assignments were made with the express approval of the Creditors' Committee representing approximately 80% of the unsecured creditors and were in fact signed by the Chairman of the Committee (R. 26, 29, 30).

Notice of the aforementioned assignments was not given the obligors of the accounts receivable and moneys due and to become due under the contracts (R. 25, 34). As of the date of bankruptcy there was due the Bank on account of all of the above transactions the principal sum of $7,954.51 (R. 15).

In addition to the above, the Bankrupt obtained on April 12, 1940, from Edward C. Dearden, Sr., one of the Petitioners herein, a loan of $1,550, secured by the contemporaneous assignment of a contract between Bankrupt and York Ice Machinery Company and any moneys due or to become due thereunder (R. 2, 6, 10).

No notice, however, was given to York Ice Machinery Company of this assignment (R. 12, 13, 14).

After the filing on April 15, 1940, of the involuntary petition in bankruptcy, the Bank filed its claim as a secured

creditor in the sum of $7,954.51 (R. 15), and Dearden, Sr. filed a petition for reclamation of the sum of $1,550 from the proceeds of the York Ice Machinery contract (R. 2).

The Trustee recognized that the aforementioned assignments were made as security for contemporaneous loans, but resisted Petitioners' claims on the basis of the wording of the second sentence of Section 60 (a) of the Chandler Act. The clause he relied on provides that

> "a transfer shall be deemed to have been made at the time when it became so far perfected that no bona fide purchaser from the debtor and no creditor could thereafter have acquired any rights in the property so transferred superior to the rights of the transferee therein * * *"

This provision, the trustee contended, had effected a change in the previously accepted view of a preference. A hypothetical bona fide purchaser of the receivable, it was argued, *could* have acquired a right in it superior to the Bank's right by notifying the obligor of the receivable. Therefore the transfer had not been perfected. Therefore it must be deemed to have been made at a date after it was actually made. Therefore the consideration for the transfer, although actually given contemporaneously with the transfer, must be deemed to be antecedent to the transfer. Therefore, it is an antecedent debt, and therefore a preference. Thus the reasoning of the trustee.

Referee in Bankruptcy Henry W. Braude on April 21, 1941, allowed the claims of the Bank and of Edward C. Dearden, Sr. (R. 38, 14). The United States District Court for the Eastern District of Pennsylvania, by Kirkpatrick, J., affirmed the Referee's orders (R. 38). Respondent

herein then appealed to the United States Circuit Court of Appeals for the Third Circuit, which, by an opinion filed August 12, 1942 (R. 41), (Judge Jones dissenting, R. 46), reversed the decree of the District Court (R. 46). The holding of the Circuit Court was to the effect that the Chandler Act had changed the law, and, because of the failure to give notice, the assignment to Petitioners of the accounts receivable and moneys due and to become due under the contracts constituted a preference within the meaning of the Bankruptcy Act, as amended.

SPECIFICATION OF ERRORS INTENDED TO BE URGED.

The Petitioners intend to urge the following assigned errors:

That the Circuit Court of Appeals for the Third Circuit erred:

1. In holding that where a transfer is made as security for a contemporaneous debt, the same will be deemed to have been made for or on account of an antecedent debt so as to constitute a preference within the meaning of the new provisions of Section 60 (a) of the Bankruptcy Act, if the transfer was not so far technically perfected at the time the loan was made that no bona fide purchaser from or creditor of the debtor could have acquired any rights in the transferred property superior to the transferee, which holding is erroneous for the following reasons:

(a) The amendment to Section 60 (a) of the Bankruptcy Act does not purport to change the prior rule that a transfer of property by a debtor as security for a contemporaneous loan is not a

transfer for or on account of an antecedent debt; compare Section 60 (b).

(b) Section 60 (a) does not purport to change the prior rule and invalidate a transfer which has caused no diminution of the bankrupt estate.

(c) Section 60 (a) does not purport to give the Trustee the status of a bona fide purchaser; sections 70 (a) and (c) of the Bankruptcy Act indicate that Congress did not purport to change the prior law on this question.

(d) The interpretation of the Circuit Court of Appeals creates an unreasonable inconsistency between Section 60 (a) and Section 70 (d), which validates transfers made in good faith after bankruptcy for a present consideration and before adjudication or possession taken.

QUESTIONS PRESENTED.

1. Whether the Chandler Act of 1938 (Section 60 (a) of the Bankruptcy Act, as amended) has changed the prior definition of a preference so as to include a transfer of an account receivable for a present adequate consideration, where no notice is given to the debtor.

2. Whether the second sentence of Section 60 (a) of the Bankruptcy Act, as amended by the Chandler Act, fixing the time at which a transfer is deemed to have been made, has the effect of transforming, by a legal fiction, a transfer for a present consideration into a transfer for an antecedent debt.

SUMMARY OF ARGUMENT.

Under a proper construction of Section 60 (a) of the Bankruptcy Act as amended, a bona fide transfer for a present adequate consideration cannot result in a preference. This is borne out by a consideration of the new amendments to Section 60 (a), by the history of the prior provisions of Section 60 (a) and of other provisions in the Bankruptcy Act. All of the lower Courts which have considered the present question, except the Court below in this case, have reached the conclusion contended for by Petitioners.

ARGUMENT.

The facts not being in dispute, the question is purely one of the proper legal interpretation of Section 60 (a) of the Bankruptcy Act, which provides as follows:

> "A preference is a transfer, as defined in this Act, of any of the property of a debtor to or for the benefit of a creditor for or on account of an antecedent debt made or suffered by such debtor while insolvent and within four months before the filing by or against him of the petition in bankruptcy . . . the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class. For the purposes of subdivisions (a) and (b) of this section, a transfer shall be deemed to have been made at the time when it became so far perfected that no bona fide purchaser from the debtor and no creditor could thereafter have acquired any rights in the property so transferred superior to the rights of the transferee therein, and, if such transfer is not so perfected prior to the filing of the petition in bankruptcy . . . it shall be deemed to have been made immediately before bankruptcy."

A Transfer for a Present Consideration by Its Very Nature Can Never Be a Preference.

Before it is possible to have a preference, it would seem obvious that someone, who should share equally with another in the assets of the bankrupt, must get more than his fair share. The word "preference" imports the relation of existing creditors having equal equities at the time of the transfer, whereby the rights of one are advanced over those of another. When full value is given for the thing transferred by the bankrupt, clearly the bankrupt has just as much as he had before the transfer and no one has

been injured. The decision of the Circuit Court of Appeals in this case is that despite the fact that the petitioners made loans to the Quaker City Sheet Metal Company at the time that they received the collateral of the assigned accounts, nevertheless they must give up their rights against the collateral and be treated as general creditors. It would be just as logical to say that if they had bought something from the bankrupt at its fair value, they must return it and be relegated to the position of general creditors with respect to their claims to receive back the purchase price paid. There is no essential difference between the two transactions so far as the rights of the claimants against the bankrupt estate are concerned. Neither the lender on collateral nor the outright purchaser is the owner of any claim at the time of the transfer. Both the lender and the purchaser received something from the bankrupt by virtue of the transfer, for which they at the same time paid full value, so that there can be no depletion of the bankrupt's estate at the expense of the general creditors. Where a loan is made and secured by collateral contemporaneously given, the fundamental essential of a preferential transfer is lacking. "The mortgage was not voidable as a preference under § 60b. Preference implies paying or securing a pre-existing debt of a person preferred.": *Dean v. Davis*, 242 U. S. 438, 443 (1917). "A preference presupposes some credit given, a period when the debt existed unsecured; there can be none when the debt is secured as soon as it becomes a debt.": *Ross v. Francis*, 72 Fed. (2d) 358 (C. C. A. 2, 1934).

The object of prohibiting preferences is of course to prevent favoritism among those of the debtor's creditors who ought in fairness to stand on the same footing. It is a

necessary corollary that before such favoritism can exist the transfer must result in a depletion of the estate.

The first sentence of Section 60 (a) clearly states that a preference must involve a transfer "*to or for the benefit of a creditor for or on account of an antecedent debt*". The effect of the transfer must be to enable the creditor to obtain a greater slice of his debt than some other creditor of the same class. The definition of a creditor in Section 1, subsection (11) provides:

> "'Creditor' shall include anyone who owns a debt, demand or claim provable in bankruptcy, . . ."[1]

Since in the present case the transfers of the assigned accounts were made in consideration of contemporaneous loans by the petitioners, it is obvious that they were not creditors within the meaning of Section 60 (a) for the simple reason that they did not then own any debt provable in bankruptcy. Hence, they could not possibly have been in the "same class" with the unsecured creditors whom the Trustee represents.

History of Section 60.

The history of Section 60 of the Act clearly demonstrates that it has not now and never has had anything to do with transfers contemporaneous with loans to the bankrupt. The Section has been several times amended but always these amendments have been for the purpose of clarifying, with relation to the four months' period, the time at which a transfer for an *antecedent debt* became perfected. The first amendment to the 1898 Bankruptcy

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[1] Act of June 22, 1938, c. 575, Sec. 1, 52 Stat. 840, 11 U. S. C. A., Sec. 1.

Act[1] was made in 1903. This amendment[2] provided that, if recording of a transfer was required, the four months' period was prolonged or delayed until the transfer was in fact recorded. Nevertheless, the Courts subsequently held that the time of recording as distinguished from the date of the transfer, did not necessarily furnish the criterion as to the preferential character of the transfer. *In re Watson*, 201 Fed. 962 (D. C. Ky., 1912), aff. 216 Fed. 483, Appeal dism. 239 U. S. 656; *In re Sturtevant*, 188 Fed. 196 (C. C. A. 7, 1911). In 1910 another amendment[3] was passed making a transfer voidable if recording is required and if at the time of the recording the bankrupt was insolvent. In 1926 Section 60 (a) was again amended[4] so as to make it apply to cases where recording was *permitted* as well as to cases where recording was *required* by law. However, Section 60 (b) relating to voidable preferences was not amended at that time and consequently a controversy arose as to whether the preference was voidable where the recording was permitted but not required.

The apparent purpose of the present amendment was to make transfers voidable which either can or should be perfected, if they are not in fact perfected within four months of bankruptcy or at a time when the bankrupt was solvent, *provided always that the transfers were for or on account of an antecedent debt.* In every case it is first necessary to determine *whether there has been a preference*, and unless there has been, we never reach the second

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[1] Act of July 1, 1898, C. 541, Sec. 60, 30 Stat. 562.
[2] Act of Feb. 5, 1903, C. 487, Sec. 13, 32 Stat. 799.
[3] Act of June 25, 1910, C. 412, Sec. 11, 36 Stat. 842.
[4] Act of May 27, 1926, C. 406, Sec. 14, 44 Stat. 666.

question under Section 60, namely, *whether such preference is illegal and may be set aside.*

An examination of the original Act and its amendments shows that in all of them the definition of a preference contains the fundamental that *the effect must be that one creditor is enabled to obtain a greater percentage of his debt than some other creditor of the same class.* See the Appendix to this brief, in which the text of the original Act and the various amendments is given, the requirement of Section 60 (a) that the effect of a preference must be to give one creditor a greater percentage of his debt than another creditor of the same class being italicized in each case.

It is therefore clear that the Chandler Amendment of 1938 to Section 60 of the Bankruptcy Act was not intended to affect transfers made for a present consideration. The purpose was simply to eliminate the situation which formerly arose *where a transfer was made for or on account of an antecedent debt*, and then the transfer was recorded within four months of bankruptcy. Under the previous law where the recording statute was permissive and not mandatory, such recording related back to the date of the assignment (i. e., more than four months before bankruptcy) and the transfer, even though for an antecedent debt, was permitted to stand as against the Trustee in Bankruptcy. Under Section 60, as amended by the Chandler Act, this can no longer occur.

Validity of Transfers for Value Is Recognized Throughout the Act.

There is nothing in the Chandler Act amendments to indicate that Congress intended to change the basic conception of a preference or to affect transfers made *at any*

time for a present consideration. In fact, an examination of the Act as a whole shows exactly the contrary.

Subsection (b) of Section 60 provides:

> "Where the preference is voidable, the trustee may recover the property, or, if it has been converted, its value, from any person who has received or converted such property, *except a bona fide purchaser from or lienor of the debtor's transferee for a present fair equivalent value: Provided, however, that where such purchaser or lienor has given less than such value, he shall nevertheless have a lien upon such property, but only to the extent of the consideration actually given by him.*" (Emphasis supplied.)

Certainly Congress never intended that a bona fide purchaser from one who had received a voidable preference should be able to retain that which he received to the extent that he gave value for it, but at the same time one who had bona fide and in good faith given value directly to the bankrupt should be relegated to the position of a general creditor.

Subsection (c) of Section 60 provides:

> "If a creditor has been preferred, and afterward in good faith gives the debtor further credit without security of any kind for property which becomes a part of the debtor's estate, the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him."

In other words, a preferred creditor who gives further credit is entitled to a setoff. It is impossible to believe that Congress intended that one who gives value originally shall be entitled to nothing except to claim as a general creditor.

Section 70 (d) provides:

> "After bankruptcy and either before adjudication or before a receiver takes possession of the property of the bankrupt, whichever first occurs:—
>
> (1) A transfer of any of the property of the bankrupt, other than real estate, made to a person acting in good faith shall be valid against the trustee if made for a present fair equivalent value or, if not made for a present fair equivalent value, then to the extent of the present consideration actually paid therefor, for which amount the transferee shall have a lien upon the property so transferred;" Act of June 22, 1938, C. 575, Sec. 1, 52 Stat. 879, 11 U. S. C. A. Sec. 110.

Under this Section a bankrupt, *after* bankruptcy, may make a transfer to a person acting in good faith, and such transfer will be protected to the extent of the present consideration given therefor. It is absurd to suppose that Congress intended to place transactions for a present consideration prior to bankruptcy in a less advantageous position than those made after bankruptcy and yet the result of the decision of the Circuit Court of Appeals in the present case is that what may be properly done after bankruptcy may not be done before. As stated by Mr. Neuhoff in his able article "Assignments of Accounts Receivable as Affected by the Chandler Act" in *34 Ill. L. Rev.* 538, 544 (1940):

> "While it would be legally possible for Congress so to provide, the difficulty in justifying such disparity of treatment on any logical theory leads very forcibly to the conclusion that Congress had no such intention."[1]

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[1] See also *4 Remington on Bankruptcy* (4th Ed.) Sec. 1717; *Hamilton, The Effect of Section 60 of the Bankruptcy Act upon Assignments of Accounts Receivable,* 26 Va. L.

It is clear that where value is given time is wholly unimportant. If there is any distinction at all, it is in favor of the validity of transactions occurring prior to bankruptcy. As we all know, one of the purposes of the Bankruptcy Act is to encourage, not to defeat, the giving of credit to those in financial difficulties in the hope that they may be surmounted. This was well expressed by Mr. Justice Davis in *Tiffany v. Boatman's Institution*, 85 U. S. 375 (1873), where he said (p. 388):

> "And it makes no difference that the lender had good reason to believe the borrower to be insolvent if the loan was made in good faith, without any intention to defeat the provisions of the Bankrupt Act. It is not difficult to see that in a season of pressure the power to raise ready money may be of immense value to a man in embarrassed circumstances. With it he might be saved from bankruptcy, and without it financial ruin would be inevitable. If the struggle to continue his business be an honest one, and not for the fraudulent purpose of diminishing his assets, it is not only not forbidden, but is commendable, for every one is interested that his business should be preserved. In the nature of things he cannot borrow money without giving security for its repayment, and this security is usually in the shape of collaterals. Neither the terms nor policy of the Bankrupt Act are violated if these collaterals be taken *at the time* the debt is incurred. His estate is not impaired or diminished in consequence, as he gets a present equivalent for the securities he pledges for the repayment of the money borrowed. Nor in doing this does he prefer one creditor over another, which it is one of the great objects of the Bank-

Rev. 168 (1939); *Kach, Transfers of Non-Negotiable Accounts and the Chandler Act*, 46 Commercial L. J. 133 (1941).

rupt law to prevent. *The preference at which this law is directed can only arise in case of an antecedent debt.* To secure such a debt would be a fraud on the act, as it would work an unequal distribution of the bankrupt's property, and, therefore, the debtor and creditor are alike prohibited from giving or receiving any security whatever for a debt already incurred if the creditor had good reason to believe the debtor to be insolvent. But the giving securities *when* the debt is created is not within the law, and if the transaction be free from fraud in fact, the party who loans the money can retain them until the debt is paid.". (Emphasis supplied.)

Of course, the Tiffany case arose under the old Bankruptcy Act of 1867 (14 Stat. 517). The purposes of that Act were however the same as those of the present law and the principles of the Tiffany case have never been modified or reversed. To the same effect is the statement of Mr. Justice Brandeis in the case of *Dean v. Davis*, 242 U. S. 438 (1917), where he said (p. 443):

> "The mortgage was not voidable as a preference under § 60b. Preference implies paying or securing a pre-existing debt of a person preferred."

(p. 444):

> "The mortgage may be made in the expectation that thereby the debtor will extricate himself from a particular difficulty and be enabled to promote the interest of all other creditors by continuing his business."

That is exactly the situation which we have in this case. Quaker City Sheet Metal Company was enabled by reason of the advances made to it by the petitioners, to carry on

its business and meet its payroll from May, 1938 until April, 1940 (R. 18, 29, 30, 32, 34).

That Congress should have intended such a complete and revolutionary change in the very fundamentals of the Bankruptcy Law cannot be imputed to it in the absence of a clear showing that the question was called to its attention and that it acted upon it with its eyes open. As Mr. Neuhoff puts it (34 *Ill. L. Rev.* 544):

> "If it is to be converted into a preference by legal legerdemain, the minimum requirement should be that the intention of Congress so to do shall be clearly expressed and not be based upon an obscure 'cross reference.'"

We have examined the Report of the Congressional debates and there is nothing in them, nor in the Report made by Mr. Chandler to Congress, which indicates that Congress had such an intention. See Report No. 1409, on H. R. 8046, July 29, 1937, 75th Congress, 1st Session; 14 Ohio Law Reporter 168.

The Chandler Act further amended the Bankruptcy Act by removing therefrom subsection (d) of Section 67, which provided as follows (11 U. S. C. A. Sec. 107 (d)):

> "Liens given or accepted in good faith and not in contemplation of or in fraud upon the provisions of this title, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall, to the extent of such present consideration only, not be affected by anything herein.": Act of June 25, 1910, c. 412, Sec. 12, 36 Stat. 842.

It is clear that this Section was omitted because the amendments to Section 60 (a) made this Section 67 (d)

no longer necessary. Prior to the 1938 amendment of Section 60 (a) the definition of a preference had not contained the words "for or on account of an antecedent debt". See Appendix. By the inclusion of these words in the 1938 amendment the clear intention was to provide that a transfer should only be a preference if the consideration therefor was an antecedent debt. In other words, by so stating in Section 60 (a), it became unnecessary to state the same thing in reverse, i. e., that liens given for a present consideration shall be valid. As explained in the House Committee Report No. 1409, above referred to, the purpose was "to eliminate the overlapping, discard the present cumbersome phrasing, and state the test more accurately, scientifically and comprehensively".

The Decisions.

All of the cases which an exhaustive search has been able to discover support the position of the petitioners. The principal case is that of *Adams v. City Bank & Trust Co.*, 115 F. (2d) 453, 134 A. L. R. 1215 (decided by the Circuit Court of Appeals for the Fifth Circuit in 1940). In that case the bankrupt had given a bill of sale covering personal property to secure an indebtedness simultaneously created. This bill of sale was not recorded until a time when the debtor was insolvent, which time was within four months of bankruptcy, when the creditor had reason to believe that the bankrupt was insolvent. The District Court held that there was no preference within Section 60 (a) of the Bankruptcy Act as amended in 1938, and the Circuit Court of Appeals affirmed this decision, saying, page 454:

> "Prior to the Chandler Act, it was universally recognized that there was no preference, unless there was

a diminution of the estate by reason of the transfer. The preference at which the law was directed could only arise in case of an antecedent debt.

* * * *

It is argued that the Chandler Act has changed the former rule by providing that a transfer shall be deemed to have been made at the time when it became so far perfected that no bona fide purchaser from the debtor and no creditor could thereafter have acquired any rights in the property so transferred superior to the rights of the transferee therein, and that, if such transfer is not so perfected prior to the filing of the petition in bankruptcy, it shall be deemed to have been made immediately before bankruptcy. This argument fails to give due weight to the first sentence of section 60, sub. a, of said act, which provides that a preference is a transfer of the property of a debtor 'for or on account of an antecedent debt.' This refers to the whole transaction, and not simply to the step to be taken to make it binding as to subsequent creditors and purchasers for a valuable consideration. . . .

Our conclusion is that section 60 does not apply to a transfer entered into without fraudulent intent, for an adequate present consideration. In the instant case, the bills of sale were given for a present equivalent at the time the debts were incurred, and did not become preferences voidable in bankruptcy by reason of subsequent filing for record, while the debtor was insolvent, less than four months before the time of bankruptcy." (Emphasis supplied.)

This Court denied certiorari, 312 U. S. 699.

In *Girard v. Kimbell Milling Co.*, 116 F. (2d) 999 (C. C. A. 5, 1941), the same Court followed its earlier decision in the Adams case, saying (p. 1001):

"There was never an unsecured debt, and without that there could be no preference."

Again, in the case of *In re Talbot Canning Corp.*, 35 F. S. 680 (U. S. D. C., Md., 1940) it was held that Section 60 (a) applies only to transfers given for antecedent debts. In that case the Talbot Company had a contract with Sisk & Sons, whereby the latter was to provide it with cans for its business and to sell its products on commission. The Talbot Company purchased its raw materials from Associated Seed Growers, Inc. Seed Growers became dissatisfied with the financial condition of the Talbot Company and demanded security before shipping more merchandise. Accordingly, the Talbot Company assigned to the Seed Growers certain moneys due or to become due from Sisk & Sons on account of finished canned goods which Sisk & Sons either had sold or was selling for the Talbot Company. The Referee held that this assignment constituted a preference under Section 60 (a) of the Bankruptcy Act. The District Court reversed, saying (p. 685):

> "Prior to the amendment of the Bankruptcy Act in 1938, the rule in effect in this Circuit was that equitable liens given for antecedent debts, if created before the four months' period preceding bankruptcy, were valid and enforceable against the trustee in bankruptcy, and were not voidable as preferential even though the funds upon which such liens were a charge, were collected within such four months' period, or even after an adjudication in bankruptcy."

The Court then recited the new provisions incorporated in the Bankruptcy Act of 1938 and held that if the assignments were not given for antecedent debts they were good as against the trustee in bankruptcy, saying (p. 687):

> "If they were not so given, but were given for new purchases in good faith, then, although as we have

seen, the old provision of the Bankruptcy Act expressly protecting such transfers to the extent of the present consideration has been omitted in the new Act, it is not to be inferred from this omission that transfers for present consideration are now brought within the purview of voidable preferences. The inference is just the contrary, *for if value has been given there has been no depletion of the bankrupt's estate and hence no preference.* The definition of a preferential transfer in section 60, sub. a, of the new Act is confined to a transfer given 'for or on account of an antecedent debt,' and under section 60, sub. b, bona fide purchasers for present consideration from a preferred creditor are expressly protected; as is also the preferred creditor under Section 60, sub. c,—which remains as it was before the amendments of 1938,—by way of setoff, to the extent that he may have given new credit in good faith to the bankrupt." (Emphasis supplied.)

The case was remitted to the referee to determine whether or not the assignment was made for an antecedent debt, and, if so, whether or not the assignee had reasonable cause to believe that the bankrupt was then insolvent. The referee found that the assignee did have reasonable cause to believe that the bankrupt was insolvent at the time of the assignment but that the assignment having been for a present consideration, it was not voidable by the trustee in bankruptcy. Upon a second appeal to the District Court of Maryland, 39 F. S. 858 (1941), that Court found as a fact that the assignment had been for an antecedent debt and therefore reversed the referee. The case was then appealed to the Circuit Court of Appeals for the Fourth Circuit under the title of *Associated Seed Growers, Inc. v. Geib*, 125 F. (2d) 683 (1942). The Circuit Court of Appeals for the Fourth Circuit reversed the District Court upon the

ground that it had been in error in finding that the assignment was for an antecedent debt, saying (p. 685):

> "In short, *the assignment was not given for an antecedent debt* but for a present consideration, and since Seed Growers complied with the new contract by shipping the goods, it is entitled to the benefit of the assignment if the assignment is otherwise valid.
>
> *It follows that an essential element of a voidable preference, defined in Section 60, sub. a of the Bankruptcy Act, 11 U. S. C. A. § 96, sub. a, is missing;* and hence the second question listed above" (i. e., whether the assignments constituted voidable preferences under the Bankruptcy Act) "should have been decided in the claimant's favor." (Emphasis supplied.)

The same conclusion was reached in *In Re E. H. Webb Grocery Co.*, 32 F. S. 3 (U. S. D. C., Tenn., 1940). In that case the Court held that the proper interpretation of Section 60(a) disregards the fact that a transfer is only recorded within the four months' period in cases in which the transfer is for a present consideration and does not deplete the bankrupt estate. The District Court, reversing the Referee, said (pp. 4, 5):

> "It is my idea that the Referee has misconstrued this section of the statute. I think that this section of the statute did not change in substance the prior law but simply clarified the former provisions.
>
> Under the facts as stated, I think unquestionably that the mortgage created a lien in favor of the Hooper Grocery Company on September 15, 1938. That is, a lien good between the parties.
>
> Under the Tennessee statutes and authorities, a lien created by a mortgage, unregistered, is good between the parties and is good against everyone except

lien or judgment creditors. When the mortgage is registered it relates back to the date of its execution and is good as of that date as against everyone except lien or judgment creditors.

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I am of the opinion that this transfer was perfected on September 15, 1938, which was more than four months before bankruptcy. I think it was for a valuable consideration, in good faith, did not deplete the estate and was not for an antecedent debt."

It is interesting to note that in the Webb case the mortgage was made on September 15, 1938, and recorded the next day, September 16th, whereas the bankruptcy occurred on January 16, 1939. Hence, had the Court adopted the view of the majority of the Court below in the case at bar, the mortgage would have been within the four months' period and voidable by the trustee in bankruptcy. As a practical matter, a very large percentage of deeds and mortgages are not recorded until a day or two after they are given, either because the Recorder's Office is closed for the day or the document has to be sent to another County for record. Should the decision in the case at bar be sustained, all such transactions, even though given for a present consideration, will be voidable if the recording is within the four months' period. Similarly, where accounts receivable are assigned, anywhere from one to several days will ordinarily elapse between the date of the assignment and the giving of notice by the assignee to the person owing the assigned debt, depending upon their respective geographical locations. Consequently, in States which require such notice, in order to make the assignment good against the world it would not be safe for the lender to actually make the loan until after he had given such notice and received

an acknowledgment. The result in each case would be to complicate all such transactions and make necessary a change in common business practices which have been in effect for years. It is hardly likely that Congress intended the amendment of Section 60 (a) to have any such effect.

The Opinions in the Court Below.

The majority of the Circuit Court of Appeals in its opinion in the case at bar states (R. 43):

> "The rule which the second sentence of subdivision a lays down as to the time when a transfer is to be deemed to have been made is stated, to be 'for the purposes of subdivision a,' inter alia. It is thus clear that the rule is intended to apply to the provisions of the first sentence of that subdivision insofar as they involved questions having to do with the time of making a transfer. There is no indication that its application to the first sentence is to be restricted to the mere determination of whether a transfer is made while the debtor is insolvent and within four months of bankruptcy. On the contrary it is obvious that the time of the making of a transfer is the essential element in determining whether a debt on account of which it is made was antecedent to it."

We submit that in reaching this conclusion the Circuit Court of Appeals overlooked the fact that there is no occasion at all to apply the rule with respect to when a preferential transfer may be set aside, unless you have a preference to start with. The Court is confusing two entirely different things. The first sentence of Section 60 (a) which defines a preference, expressly provides that it is a transfer for an antecedent debt. The second sentence is not an enlargement of the meaning of the term "antecedent debt" used in the definition contained in the first sentence. On

the contrary, it is merely a formula to ascertain whether a transfer for a factual antecedent debt shall be deemed to have been made within four months of bankruptcy. The conclusion of the Court below can only be reached by using the formula for the application of the definition to change the plain stated meaning of the definition itself.

We are unable to improve upon the summary of our position given by Judge Jones in his dissenting opinion in the Court below (R. 47-49):

> "And so, according to the prevailing argument, the entire transaction of contemporaneous loan and transfer is split apart and the unperfected[3] transfer is 'deemed to have been made immediately before bankruptcy', as Sec. 60 (a) provides, while the loan for which the transfer was contemporaneously made retains the original date of the actual transaction and thus becomes antecedent in relation to the time of the transfer, as statutorily presumed under the attending circumstances. To so hold seems to be a striking instance of lifting oneself by one's bootstraps and terminates in a result which I do not think Sec. 60 (a) was intended to bring about. When the time of the transfer is brought to 'immediately before bankruptcy' by virtue of Sec. 60 (a) because of a want of perfec-

[3] The term 'unperfected' as used herein should not be taken to imply that the assignments in this case were wanting in legal validity. Under local law they were binding and conclusive as to the assignor and its creditors from the time they were made. See Phillips's Estate (No. 4), 295 Pa. 525, 531. They were, moreover, good against the world except that a subsequent bona fide purchaser without notice could have acquired rights in the assigned accounts superior to the rights of the original assignees if he was first to give notice of his acquisition to the persons owing the accounts. It was only to that limited extent that there was any want of perfection in the transfers.

tion thereof as against a bona fide purchaser and creditors of the transferor, the fact as to whether the unperfected transfer was for an antecedent debt or for a debt contemporaneously incurred is still to be reckoned with on the basis of actuality. It will be observed that Sec. 60 (a) does not strike down an unperfected transfer but merely moves, by legal presumption, the time of its occurrence to 'immediately before bankruptcy'.

In my opinion, the provision in Sec. 60 (a) with respect to the presumed time of transfer under the specified conditions was incorporated in the Chandler Act in order to bring constructively within the four months of bankruptcy (and thus render adjudicable on that basis) all unperfected transfers made while the debtor was insolvent more than four months prior to bankruptcy. Before the Chandler Act, the law did not reach such earlier transfers by an insolvent debtor. But under Sec. 60 (a), as now amended, any unperfected transfer by an insolvent can be assailed as a preference if, when actually made, the consideration therefor was an antecedent debt. So construed, the provision in Sec. 60 (a), relating to the legally presumed time of transfer, works an important change in the law but it has nothing to do with determining the relative date of the incurrence of the debt for which an unperfected transfer was contemporaneously made. *Whether the unperfected transfer, when made, was made on account of an antecedent debt or for a present consideration of full money's worth remains the criterion for determining whether the transfer constituted a preference.*

What the bankruptcy law is primarily concerned with is the equitable distribution of a bankrupt's estate among creditors. A preference is the favoritism by an insolvent debtor of one creditor over others.[4]

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[4] 3 Collier on Bankruptcy (14th ed.) par. 60.02, pp. 750-751.

But, in order that a payment or transfer by a debtor to one creditor may amount to a preference, it is necessary that the debtor's estate be thereby depleted so that the remaining creditors cannot ratably receive commensurate shares on account of their claims.[5] A transfer therefore which does not reduce the value of a debtor's estate because he contemporaneously receives full value in exchange is not a preference. It is hardly likely that Congress intended by bringing an unperfected transfer to 'immediately before bankruptcy' to constitute a preference out of a transaction which in no way depleted the debtor's estate. Bankruptcy does not disapprove of an insolvent debtor's giving security, even down to the date of bankruptcy, for a present loan of full value. Such action may possibly sustain the breath of fiscal life in a gasping debtor until complete recovery to the ultimate benefit of creditors generally. Indeed, it was in furtherance of that hope that the subject loans in the instant case were given and the transfers made as security therefor. The debtor's estate was in no way depleted but received a needed and desired present benefit. In any view, a contemporaneous transfer in such circumstances is no more a preference under the Chandler Act amendment of Section 60 (a) than it was prior to the amendment." (Emphasis supplied.)

As suggested in the above quotation from the opinion of Judge Jones, the granting of the loans and the assignment of accounts receivable was one transaction. The Courts have so held on several occasions. See *Bridgers v. Hart*, 200 N. C. 685, 158 S. E. 242 (1931); *In Re Perpall*, 271 Fed. 466 (C. C. A. 2, 1921); *In Re Metropolitan Dairy*

[5] See Newport Bank v. Herkeimef Bank, 225 U. S. 178, 184; also 3 Collier on Bankruptcy (14th Ed.) par. 66.19, p. 819.

Company, 224 Fed. 444 (C. C. A. 2, 1915); *In re E. H. Webb Grocery Co.*, 32 F. S. 3, supra. If the fiction in the second sentence of Section 60 (a) is to be applied to move forward the date of the assignment, it must apply equally to the date of the loan. The transaction cannot be split so as to treat the loan as having been made upon its actual date and at the same time move up the date of the assignment in consideration whereof the loan was contemporaneously made.

No Secret Lien in This Case.

It is said by the majority of the Court below (R. 44) that the purpose of the Chandler Act amendment to Section 60 (a) was to strike down secret liens even though given for a present consideration. The effect of the interpretation of the majority of the Court below is to strike down secret and open liens alike. If the petitioners had given notice to the persons owing the assigned accounts, how would that have made the claims of the petitioners any less secret so far as a subsequent assignee was concerned? If such assignee would not take the trouble to look at the books of the assignor where he would have seen the assignments plainly noted, would he be any more likely to write to the persons owing the assigned accounts and ask them if they had had notice of an assignment? Again we quote from the dissenting opinion of Judge Jones below (R. 50) where he said:

> "Nor am I able to see how Sec. 60 (a) was intended, as the majority suggest, 'to strike down secret liens even though given for a present consideration'. The time of the making of a secret lien, if perfected

under local law, is no more deemed to have been 'immediately before bankruptcy' than is the time of the making of a perfected open lien. And, by the same token, an unperfected open lien is subject to the same limitation under Sec. 60 (a) as is an unperfected secret lien. In no sense does Sec. 60 (a) seek to discriminate between secret and open liens. It simply prescribes the requisites under the bankruptcy law for determining the existence of a preferential transfer. And this, it does without attempting in any way to pass disapprovingly upon what may be a valid (although secret) lien under local law."

The facts of the present case furnish an excellent example of the effect of the decision of the Circuit Court of Appeals on liens which are not secret, for there was certainly nothing secret about the liens of the Petitioners. The great majority of the unsecured creditors, now represented by the Trustee in Bankruptcy, knew all about them. Before the loans were made the matter was submitted to representatives of the five principal creditors, who after referring the matter back to their respective Home Offices, entered into an agreement subordinating their claims to new liabilities assumed by the Quaker City Company (R. 7, 8, 27). A Creditors' Committee was appointed, to whom the Quaker City Company agreed to give weekly statements showing all transactions and that the Committee might at any time examine its books (R. 7, 8). The Committee countersigned all checks, executed the assignments to the Bank, signed the notes to the Bank and supervised the business (R. 29-30). The Quaker City Company made notations of the assignments upon its invoices and stamped on its ledger sheets the following legend:

> "For value received this account has been assigned to the Corn Exchange National Bank and Trust Company."

or words to that effect (R. 28).[1]

It is interesting to note that the procedure followed in this case is exactly that which has since been adopted by the Pennsylvania Act of July 31, 1941, P. L. 606 (69 Purdon's Pennsylvania Statutes, Ann., sec. 561), which provides that where the books of the assignor of accounts receivable disclose their assignment, then such assignments shall be valid against all subsequent purchasers, pledgees, creditors, etc., notwithstanding the fact that notice has not been given to the persons owing the accounts receivable. The obvious reason for this change in the Pennsylvania law is that the place to look for an assignment of accounts receivable is on the books of the assignor.

The Status of the Trustee in Bankruptcy.

It was contended by our opponents in the Court below that by Section 60, as now amended, the trustee in bankruptcy has been given a new status, namely, that of a bona fide purchaser. The simple answer to this suggestion is that if there had been any such intention, it would have been so stated in the Sections of the Act which define the status of the trustee. This is covered by Section 70 (a), the first sentence of which provides:

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[1] It has been held in several cases that under such circumstances there can be no bona fide purchaser for the reason that the failure of an assignee to examine books of the assignor prevents the assignee from having such status. See *In Re Johnson-Maas Company*, 45 A. B. R. (N. S.) 32 (1939); *In Re Leader Furniture Company*, 36 Fed. Supp. 986 (U. S. D. C., E. D. Pa. 1939).

> "The trustee of the estate of a bankrupt . . . shall . . . be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition in bankruptcy."[2]

It does not vest in him the rights of a purchaser for value and under the law of Pennsylvania, the title of a bankrupt is only to the equity in the assigned accounts after the discharge of the debts for which they have been pledged as collateral. *Phillips' Estate* (No. 4), 205 Pa. 525, 55 Atl. 216 (1903).

In those States, of which Pennsylvania prior to the Act of 1941 was an example, which have adopted the English rule laid down in the case of *Dearle v. Hall*, 3 Russ. 1, affirmed 3 Russ. 48, 38 Eng. Repr. 475, 492 (1827), to the effect that a second assignee who gives notice is preferred over a prior assignee who has failed to do so, the basis of the rule is not the failure of the first assignee to get good title but an equitable estoppel against him because by failing to give notice he has permitted the assignor to commit a fraud on the second assignee. The rule is not for the benefit of creditors generally. *Shepherd v. Penna. R. R. Co.*, 29 Pa. Superior Ct. 291 (1905). Certainly, it cannot have been the intention of Congress to displace the first assignee in favor of a trustee in bankruptcy, who is not a purchaser for value but, upon the contrary, stands in the shoes of the general creditors. To do so would be to give the trustee in bankruptcy an equity to which only a bona fide purchaser could be entitled, when in fact no bona fide purchaser exists and, if he did, his rights would be supe-

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[2] Act of June 22, 1938, c. 575, Sec. 1, 52 Stat. 879, 11 U. S. C. A. Sec. 110; see also Sec. 70 (c) idem, which gives to the trustee the rights of certain creditors only.

rior to those of the trustee in bankruptcy so that the latter would get nothing, a strange result indeed.

The Importance of the Question Involved.

The Court will take judicial notice of the fact that the lending of money upon assigned accounts receivable is one of the commonest and most important branches of the business of the commercial banks of the country. Many thousands of such transactions involving untold millions, take place each year. It is the little fellow with insufficient working capital, who must finance himself through his accounts receivable, who will be hurt the most by this decision. It is one of the principal ways in which business men obtain money with which to run their businesses. If the banks may not rely with confidence upon such security, one of the greatest sources of credit in the country will be cut off. In the year 1940 the volume of financing secured by the assignment of accounts receivable reached the astounding total of almost two billion dollars. *Saunier & Jacoby, Accounts Receivable Financing* (National Bureau of Economic Research). In the case of *In the Matter of Johnson-Maas Company*, 45 A. B. R. (N. S.) 32 (1939), it appeared from returns to a questionnaire sent out by the Department of Financial Institutions of the State of Indiana, that the banks of that State alone during the year 1938 made over 15,000 loans secured by assigned accounts for a total sum of approximately $19,500,000. The bearing of the question upon the financing of war contracts is obvious. One such case has been brought to our attention where a single loan of $10,000,000 has been held up because of the doubt cast upon its validity by the decision of the Court below. It is incredible that Congress, without discussion and without specific consideration of the point, in-

tended so revolutionary a change in this country's business and financial structure as to do away with this type of loan.

As any business man knows, it is generally impractical to give notice of the assignment to the persons owing the assigned accounts. The concern owing the account generally has a running account with the assignor, consisting of numerous items of debit and credit, and makes payment of a number of invoices in one remittance. If specific accounts were assigned to various people who then gave notice of their respective assignments, the debtor would not know how much he is to pay to each; that is, how the discounts and other credits were to be apportioned between them. This is likely to be harmful to the business of the assignor, as his customer would prefer to deal with him alone. On the other hand, the rights of the assignor and assignee as between themselves are easily adjusted. Consequently, the usual business practice is not to give such notice. This is recognized and is the underlying reason for the Act of 1941 of the Pennsylvania Legislature above referred to, making such assignments valid against the world without the necessity of notice to the persons owing the assigned accounts.

It will be noted that the second sentence of Section 60 (a) does not prescribe any territorial limits for the purpose of determining whether "no bona fide purchaser from the debtor and no creditor could thereafter have acquired any rights in the property so transferred superior to the rights of the transferee therein". Under the interpretation of the Court below, it logically follows that if by the law of any jurisdiction in the United States or elsewhere a bona fide purchaser or a creditor could acquire rights superior to those of the assignee, the security will be destroyed. Obviously, it would be impossible for the lender

to determine with any certainty whether or not this might happen. If, for example, a borrower assigns an account receivable as security for a present loan in a State in which the law does not require notice to the debtor and the borrower later goes into another State where notice is required and there makes a second assignment of the same account receivable, and the second assignee gives notice, such second assignee may well secure a right superior to that of the first assignee. Again, if a man living in New York should give a chattel mortgage upon some article as security for a contemporaneous loan, which chattel mortgage is recorded in accordance with the New York law, and the borrower later removes the chattel across the State line into Pennsylvania, where chattel mortgages are not recognized, and there sells the article, the buyer under the law of Pennsylvania would acquire a better title to it than the lender in New York. Consequently, the possibility that this might happen would invalidate the chattel mortgage in the event of the bankruptcy of the borrower.

Deeds and mortgages recorded within four months of bankruptcy, regardless of when they were given and of the fact that they were given for a present consideration, would be voidable in bankruptcy by the trustee simply because by the failure of the grantee or mortgagee to record at an earlier date, a bona fide purchaser from the grantor or a bona fide lender to the mortgagor might have secured a superior title, although in fact this never occurred.

It is clear that the question involved is one of the greatest importance to the business life of the country. The assignments here in question were taken for a present consideration, i. e., when the money was paid, so that there was no depletion of the bankrupt's estate. No artificial rule can alter that fact. Under a proper interpretation of

Section 60 (a), no assignment can be a preference if it is given for a present consideration. There must be an unsecured debt at some time or there can never be a preference. The second sentence of Section 60 (a) is only intended to determine when an assignment *for some antecedent debt* becomes perfected for the purpose of the four months' rule and is wholly inapplicable to the facts of this case.

It is therefore respectfully submitted that the decision of the Circuit Court of Appeals should be reversed.

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APPENDIX.

Bankruptcy Act, approved July 1, 1898, c. 541, 30 Stat. 562:

Sec. 60. Preferred Creditors.—(a) A person shall be deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, *and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class.*

Amendment approved February 5, 1903, c. 487, 32 Stat. 799:

Sec. 13. That subdivisions a and b of section sixty of said Act be, and the same are hereby amended so as to read as follows:

"(a) A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property; *and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class.* Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required."

Amendment approved June 25, 1910, c. 412, 36 Stat. 842:

Section 11. That section sixty, subdivision b, of said Act as so amended be, and the same hereby is, amended, so as to read as follows:

"If a bankrupt shall have procured or suffered a judgment to be entered against him in favor of any person or have made a transfer of any of his property, and if, at the time of the transfer, or of the entry of the judgment, or of the recording or registering of the transfer if by law recording or registering thereof is required, and being within four months before the filing of the petition in bankruptcy or after the filing thereof and before the adjudication, the bankrupt be insolvent and the judgment or transfer then operate as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person. And for the purpose of such recovery any court of bankruptcy, as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

Amendment approved May 27, 1926, c. 406, 44 Stat. 666:

Sec. 14. That section 60 (a), of said Act as so amended, be, and the same hereby is, amended to read as follows:

"(a) A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer to any

of his property, *and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class.* Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of recording or registering the transfer, if by law such recording or registering is required or permitted."

Amendment approved June 22, 1938, c. 575; 52 Stat. 869; 11 U. S. C. A. Sec. 96:

Sec. 60. Preferred Creditors.—(a) A preference is a transfer, as defined in this Act, of any of the property of a debtor to or for the benefit of a creditor for or on account of an antecedent debt, made or suffered by such debtor while insolvent and within four months before the filing by or against him of the petition in bankruptcy, or of the original petition under chapter X, XI, XII, or XIII of this Act, *the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class.* For the purposes of subdivisions a and b of this section, a transfer shall be deemed to have been made at the time when it became so far perfected that no bona fide purchaser from the debtor and no creditor could thereafter have acquired any rights in the property so transferred superior to the rights of the transferee therein, and, if such transfer is not so perfected prior to the filing of the petition in bankruptcy or of the original petition under chapter X, XI, XII, or XIII, of this Act, it shall be deemed to have been made immediately before bankruptcy.